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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-821

EARL BUSH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY MEMORANDUM.

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1. *This case presents a radical expansion of the mail fraud statute.* The Seventh Circuit's Opinion states:

> "What makes this case so difficult is perhaps the subtlety of the scheme in which Bush was engaged. *There is no concrete evidence of extortion, bribery, kickbacks, or a violation of any criminal law* other than the mail fraud statute." (Op. at 8, emphasis supplied.)

2. The "Memorandum of the United States in Opposition" states:

> "The indictment arose out of petitioner's use of his position in the mayor's office to influence the City's award and administration of the display advertising contract." (Govt. Mem., p. 2.)

The term "influence in this context is elusive. Petitioner at no time disclosed his interest in Dell Airport Advertising. Dell

submitted the bid most favorable to the City. This is not a situation in which Dell was awarded the contract because of Petitioner's interest; on the contrary, Dell was awarded the contract *despite* Petitioner's interest.

3. The "Memorandum of the United States in Opposition" fails to address the serious conflict within the Seventh Circuit relative to the proper application of this Court's *Maze* decision.

4. The Solicitor General incorrectly asserts that Point I of the Petition was not presented to the Court of Appeals. In fact, Point I was presented, argued and thereby preserved in the Petition for Rehearing, which was duly considered and denied by the Seventh Circuit.

5. The Solicitor General urges that affirmance of the Seventh Circuit's holding on the basis that, if Petitioner demonstrated a specific intent to defraud, it is not necessary that an actual fraud have been perpetrated. Herein lies the essence of the Seventh Circuit's unforseeable judicial enlargment of the Mail Fraud Statute. Unlike in cases of bribery, kickbacks or the like, there is no proof, in Petitioner's case, that any fraud was perpetrated. Keeping one's financial interests confidential, especially where one is not an elected official, does not constitute fraud. In Petitioner's case, there is not one wit of evidence that the City was harmed by the Dell contract. Quite the contrary, all the evidence shows that the Dell contract was the best among all alternatives and was highly profitable for the City.

6. The "Memorandum of the United States in Opposition" consistently contends that Dell Airport Advertising, Inc., paid the contract proceeds *to* Petitioner. However, Petitioner and Dell Airport Advertising, Inc., were *one in the same*. The Solicitor General's contention that a corporation is a separate legal entity does not apply to this situation. In *New Colonial Ice Co.* v. *Helvering*, 292 U. S. 435, this Court stated:

> "Of course, the rule [that a corporation and it stockholders are deemed separate entities] is subject to the qualification that the separate identity may be disregarded

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> in exceptional situations where it otherwise would present an obstacle to the due protection or enforcement of public or private rights." (292 U. S. at 442.)

In this case, where Petitioner was *sole* shareholder in Dell Airport Advertising, Inc., and where the government seeks to impose criminal sanctions, it should be estopped from relying on civil standards.

7. Because the mailings in this case were immaterial to consummation of the alleged scheme, this case falls squarely within this Court's *Maze* decision. Nor did Petitioner, by the mailings, transmitting the proceeds to the "Earl Bush Trust", seek to delay apprehension or conceal his interest.

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CONCLUSION.

This Court should clearly rule, for the benefit of others who might seek to keep their personal financial affairs private, whether Petitioner's conduct constitutes mail fraud.

The line of Seventh Circuit mail fraud cases relied on by the Government—all decisions subsequent to the conduct for which Petitioner was convicted and all involving bribery, kickbacks or other criminal conduct, cannot be applied to Petitioner. The Solicitor General fails to cite any authority that supports a mail fraud conviction in the Petitioner's case.

This Court also should settle the conflict between the Circuits, and within the Seventh Circuit, with respect to the application of the *Maze* decision.

It is, therefore, respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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February 27, 1976.

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